PROBATION PERIOD IN THE INDIVIDUAL LABOUR CONTRACT

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Abstract
This study wants to present the period of probation in the labour contract as an optional way to verify the sills of the employee, because of the Labour Code changes and from the view of the legal practice in this field. In fact, in actual labour relations, often, the work performed during the period of probation is consider performed outside of labour contract legal frame. Even more, period of probation appears, sometimes, as a unilateral manifestation of the employer's will and it manifest itself as a resolutory condition of the contract and not as a forfeiture clause of this contract. All these led us to achieve a clear and thorough research of the probation period and of the specific employment relationship during the course of it.

Keywords *probation period, forfeiture clause, dismissal, optional valability clause, seniority.*

Introduction:

The valid conclusion of the individual employment contract supposes the cumulative meeting of some general[1] and special[2] conditions of validity. The general conditions must apply to all contracts and are stipulated by the common law. The special conditions must take into consideration the provisions of Articles 27-33 from the Labour Code. Article 29 Labour Code expressly stipulates that the individual employment contract can be concluded only after the verification of professional and personal skills of the future employee. In this case, we find ourselves in the presence of a prior condition that is specific and mandatory for the valid conclusion of the individual employment contract. In other words, the employer has the legal obligation to verify the already mentioned aptitudes before concluding the individual employment contract, but he has the possibility to choose (except the public institutions and the budgetary units) the way to realise this verification, within the limits stipulated by Article 29 paragraphs 3 and 4 Labour Code. But, according to Article 30 Labour Code, the employment for the public institutions and authorities and other budgetary units can only be done by examination or contest.

Further, the same normative act regulates another way to verify the employee's skills, namely *the probationary period*. But, this time we are in the presence of a *facultative and subsidiary* verification to the contest and examination, that take place after concluding the individual employment contract[3].

The employer and the employee establish the probationary period, with one accord. Its existence, respectively the verification of employee's skills in such way *does not presume*, even if the

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[1] The legal capacity of the parties, the agreement, the object and the cause of the contract.

[2] The condition on health status, conditions of studies or training, conditions of seniority and studies, condition of work repartition, conditions of prior approval or authorization, conditions concerning the verification of personal and professional skills, conditions of election, appointment or accreditation, conditions referring to the conclusion, in Romania, of the individual employment contracts of foreigners and of the staff of foreign social commercial representations and that of the economical organizations.

[3] In this regard, Al. Ţiclea, *Tratat de dreptul muncii*, Ed. Universul Juridic, Bucureşti, 2007, p. 413 and next, L. Uţă, F. Rotaru, S. Cristescu, *Codul muncii adnotat*, vol. I, Ed. Hamagiu, 2011, p. 209 and next.

text law does not expressly stipulate it. The probationary period represents one of the employer's obligation of notifying, according to Article 17 paragraph 3 (n) Labour Code. Consequently, it may be the object of negotiation between the future employee and the employer, along with other contractual clauses.

If before the amendment of the Labour Code by Law No. 40/2011, the failure to inform the employee of the probationary period led to the withdrawal of employer's right to verify in such way the skills of the employee, we question ourselves (with reason) if it did not changed into one-sided measure of the employer, according as the above stipulation was rescinded. In other words, from the *per a contrario* interpretation of the new regulations, the failure to inform the employee of the probationary period, prior the conclusion or modification of the individual employment contract, does no longer influence the validity of the probationary period established by contract. According to Article 17 paragraph 2 Labour Code, the obligation to notifying, completely, shall be deemed to be fulfilled when the employee signs the individual employment contract. But, the presumption is a relative one, if we relate this text of law to Article 19 Labour Code. Thus, if the employer does not fulfil his obligation to informing (which, as we have already mentioned, includes the probationary period, too), the future employee or the employee (if the contract changes) may refer the matter to court and seek appropriate compensations according to the damage he suffered, as a result of the infringement in question. We cannot ignore that, today and in this field, the violation of the right to informing the employee is not sanctioned, except for the eventual damage caused. As it had been well shown by the legal literature in matter[4], in the Labour Code as subsequently amended, the obligation to inform is a mere formality, whose failure does not influence, in a significant way, the labour relationships developed later.

Returning, the reason of the possibility of resorting to the verification of the employee's skills during the probationary period is, firstly, that of giving to the employers the possibility to verify if the employee fits to his qualification, if he/she holds the aptitudes they consider to be necessary for executing the duties, and secondly, to provide them with a legal mechanism that allows them to dismiss the person that does not correspond to the requirements. On the other hand, this stipulation can work for the employee, too, because, during the probationary period, he can observe if he is content with the given job[5].

The beginning of the probationary period is marked, in principle, by the moment of concluding the individual employment contract, if the parties did not convened that the performance of the contract shall start after a certain period.

During the whole length of the probationary period, the work's performance must be done under normal conditions for the respective job. In other terms, the employee cannot be obliged, during this period, to perform work under other conditions, different or additional to those specified by the respective job[6].

Specifically, this probationary period is directly influenced by the category of the employees to which it applies and by the type of the individual employment contract. As a consequence, the effective length of the probationary period is established by the employer, but it cannot exceed 90 calendar days for the operational positions and up to 120 calendar days for the managerial positions[7].

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[4] R. G. Cristescu, C. Cristescu, *Codul muncii. Analize şi soluţii*, Ed. Hamagiu, Bucureşti, 2011, p. 83.

[5] J. C. Jevellier*, Droit du travail*, 6e édition, L. G. D., Paris, 1998, pp. 211-250.

[6] I.T. Ştefănescu*, Perioada de probă în reglementarea Codului muncii*, in the magazine *Dreptul* nr. 8/2003, p. 29.

[7] Before the amendment of the Labour Code by the Law No. 40/2011, a probationary period for the unskilled workers was established, but it could not exceed 5 working days. Nowadays, the special legal legislation applicable for the probationary period in the case of this category of employees has been abrogated. Thus, this category of employees respects the general legal legislation of the probationary period, by reference to the operational position they occupy and by reference to the concluded individual employment contract.

These periods are applicable, by category of employees, to the individual employment contracts for an unlimited duration, representing the rule in the field.

As for the modality to calculate the length of the probationary period, it has been established by jurisprudential[8] means that it is not question about a legal procedural term and that the provisions of Article 101 paragraph 1 Code of Civil Procedure do not apply in this situation. Therefore, when calculating the probationary period established in the individual employment contracts of unlimited duration, all calendar days shall be counted, inclusively the day when the probationary period starts and the day when it ends[9].

According to Article 85 Labour Code, the probationary period, for the individual employment contracts of limited duration, shall not exceed:

- 5 working days for a length of the individual employment contract of less than 3 months;
- 15 working days for a length of the individual employment contract between 3 and 6 months;
- 30 working days for a length of the individual employment contract exceeding 6 months;
- 45 working days for the employees in a management position, for a length of the individual employment contract that do not exceed 6 months.

Special lengths of the probationary period are regulated for the activities developed through a temporary employee. In this particular case, according to Article 97 Labour Code, the probationary period that can be stipulated for the accomplishment of the mission shall not exceed:

- 2 working days, when the temporary employment contract has been concluded for a period shorter or equal to 1 month;
- 5 working days, when the temporary employment contract has been concluded for a period between 1 and 3 months;
- 15 working days, when the temporary employment contract has been concluded for a period between 3 and 6 months;
- 20 working days, when the temporary employment contract has been concluded for a period exceeding 6 months;
- 30 working days for the employees in a management position, when the temporary employment contract has been concluded for a period exceeding 6 months.

It is obvious that in all these situations, the maximum length of the probationary period is regulated by imperative norms. Thus, including in the individual employment contract a probationary period that exceed the maximum length stipulated by law will engender, on the one hand, the nullity of the clause and its replacement with the applicable legal provision, and, on the other hand, the employer's engagement of the contraventional liability, under Article 260 paragraph 1 (d) Labour Code.

In the case of persons with disabilities and in the case of graduates of higher education institutions we find derogatory disposals to the norm according to which the probationary period has a subsidiary and facultative character.

Thus, the probationary period for the employees with disabilities has, first of all, an exclusive character, meaning that no other way is accepted to verify the professional skills in this situation. Since it does not exist the prior verification of the professional skills before concluding the individual employment contract, the probationary period turns into a condition of validity of the employment contract. Secondly, the probationary period for the persons with disabilities has a mandatory character: its insertion cannot be negotiate by the contractual parties.

Regarding the length of this probationary period, there are two normative acts that establish different durations. Article 31 paragraph 3 Labour Code stipulates a length of the probationary period that shall not exceed 30 calendar days; Article 83 paragraph 1 (d) of Law No. 448/2006 regarding the

[8] C. A. Bucureşti, s.a VII-a civ., confl. mun. şi asig. soc., dec. nr. 2009/R/2010.
[9] R. G. Cristescu, C. Cristescu, op. cit. p. 86.

protection and promotion of the rights of disabled persons, republished, stipulates a length of the probationary period when concluding the contract for at least 45 working days. As the principle of right *specialia generalibus derogant* works for the case of labour relationships, too, we consider that, when hiring persons with disabilities, the employer must take into consideration the length stipulated by the special law in matter: respectively to establish a minimum length of 45 calendar days[10].

Another regulation of exception, in this field, can be found in Article 31 paragraph 5 Labour Code. In this case, the graduates of higher education institutions, at the beginning of their career, benefit by an obligatory *period of stage* of six months. This term comes into force from the moment of their employment for the job or profession they obtained a licence. The length of 6 months is a general length, because, by special laws, different periods of stage can be regulated[11]. In this specific case, most of the liberal professions involves the performance of an obligatory period of professional stage when starting the career – it is the case of lawyers, notaries, legal executors, and others.

It must be specified the fact that, the probationary period, as understood by the Labour Code, must not be confused with the period of stage. The stage represents the, limited, length in which the employee, without a professional experience has the possibility to develop his/her skills, to put in practice the theoretical knowledge he acquired during his/her studies, and, last but not least, it supposes the accumulation of work experience. All this while the probationary period aims exclusively to verify the professional skills of the employee[12].

In this regard too, it must be specified that the probationary period cannot be mistaken for the professional certification, which represents the verification of the professional preparation during the execution of the individual employment contract, having as purpose to keep the employee further in the function or the job he/she performs by contract.

Coming back to the professional stage, it is provided that the employer has the obligation, at the end of the stage, to issue a graduation certificate for the employee, certificate confirmed by the territorial labour inspectorate. Also, it is forbidden to establish a probationary period for the same job after graduating the professional stage.

The exact way to realise the professional stage, respectively the rights and obligations of the parties involved in the individual employment contracts during this period, is regulated by special law.

As we had shown, the probationary period has both an optional and an obligatory character. The two features do not contradict each other, because they refer to two distinct moments. The optional character refers to the parties' possibility of negotiating a probationary period in the individual employment contract, within the limits stipulated by law. In other words, even if the initiative of introducing a probationary period belongs to the employer, it cannot be imposed to the employee. The parties' agreement is mandatory, as long as the employer and the employee find themselves on positions of legal equality. Moreover, nothing stops the employer to renounce at the probationary period in the employment contract he is about to conclude (or the concluded one).

On the other hand, the obligatory character follows two aspects. Firstly, if the parties agree on including the probationary period in the individual employment contract, this will be specified in a contractual (optional) clause, or accordingly, in an addendum to the employee's individual contract. Secondly, the employer has the obligation to verify the professional skills of persons with disabilities under the form of the probationary period. This time, as we have already seen, the law regulates a

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[10] In this regard, R. G. Cristescu, C. Cristescu, op. cit. p. 89.

[11] According to Law No. 514/2003 on organisation and practice of the profession of legal adviser, this professional category has the obligation, at the beginning of career, to perform a professional stage for 2 years, under the surveillance of a legal adviser.

[12] In this regard, Ş. Beligrădeanu, I.T. Ştefănescu, *Perioada de probă în reglementarea Codului muncii*, in the magazine *Dreptul* nr. 8/2003, p. 25; R. G. Cristescu, C. Cristescu, op. cit. p. 91.

special legal status which is derogatory from the norm established by Article 31 paragraph 1 Labour Code.

When concluding the individual employment contract, it can be established a single probationary period. If the individual employment contract is affected by a suspension, the probationary period shall not exceed the moment when the employee effectively begins his/her activity. If until this moment the employer did not express his will to verify the employee's skills in this particular case, he will not be able to negotiate a probationary period during the performance of the labour relationship.

According to Article 32 paragraph 2 Labour Code, during the performance of the individual employment contract, a new probationary period may be negotiated, if the employee enters a new position or profession with the same employer or is to perform the activity in a difficult, unhealthy or dangerous workplace[13].

There is also a case when the employer may only one time negotiate and establish a probationary period in the individual employment contract. It is the situation regulated by Article 74 Labour Code, according to which, the employer who made collective redundancies resumes his activity within 45 calendar days from the date of the collective redundancy, the dismissed employees have the right to be reemployed, with priority, on their jobs without any examination, contest or probationary period.

Following the same reasoning, the employer's right to negotiate and establish in the individual employment contract more probationary periods is limited. If, before the modification of the Labour Code, the limitation referred to the number of persons that could be employed on probation for the same position[14], at present the limitation is a temporal one. Thus, the employer can make successive employments on probationary periods for several persons, for the same position, only within 12 months. When this period ends, the employer can no longer establish a probationary period for that position. This term produces effects from the date of the first employment for the specified position, for which it had been established a probationary period[15].

The probationary period is part of the individual employment contract and it makes the object of an optional contractual clause, as we have already shown. Consequently, during its length, the employee shall enjoy all rights and duties provided for, negotiated or established by the individual employment contract, the collective labour agreement or the internal regulation. It is expressly[16] stipulated that, the probationary period represents length of service[17] and it counts as stage of contribution for the social insurance systems.

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[13] Workplaces are classified into normal workplaces, workplaces with special conditions and workplaces with special conditions as determined by legal regulations. The employees engaged in such workplaces will be subject to a compulsory medical examination conducted by the occupational physician, in the conditions and terms established by the collective labour contract at the unit and institution. In case one or more of the special conditions are found for all employees of an establishment, a department, a workshop or a workplace, it will be set for them by negotiating wages. The amount of these basic wages will not be lower than the amount of the basic wage and of the negotiated increases. For providing work in jobs with heavy, dangerous, harmful, painful or in other similar conditions, the employees are entitled, if necessary, to increases to the basic wage, to reduced duration of working time, to food to strengthen the body's resistance, to free equipment protection, sanitary materials, additional leave, provided by collective labour contracts at branch level, groups of units, units and institutions; the lengths to reduce the retirement age are those stipulated by law. At workplaces with specific conditions, where only a part of the employees are working in such conditions, only they will receive bonuses. (Collective labour contract at national level 2011- 2014).

[14] Otherwise, this legal provision was criticized, being considered that it impedes the employer's possibility to select his personnel.

[15] The legal literature has shown that this statutory provision privileges small and middle employers who can, in this way, roll an important number of employees on probationary periods, because they do not have a good recruitment system. (R. G. Cristescu, C. Cristescu, op. cit. p. 91).

[16] Article 32 paragraph 3 Labour Code.

[17] And, according to Article 16 paragraph 4 Labour Code, only the work performed under an individual employment contract shall be included in employee's length of service.

The cessation of the individual employment contract and therefore of the work relationship during or even at the end of the probationary period raised many discussions in the legal literature. The disputes referred, in generally, at the adjustment of the probationary period, under the provisions of the unadjusted Labour Code, but that appeared in practice. In fact, by O.U.G. no. 65/2005 on modification and completion of the Labour Code, it was specified that during or at the end of the probationary period, the individual employment contract could cease by a written notification, on the initiative of either party. The problem of this legal text was that it regulated a possibility that, in practice, met the refusal of the Labour Inspectorate to write this article in the employees' record books.

The jurisprudence of law courts settled this polemic. It established that, during or at the end of the probationary period, the individual employment contract may only cease by a written notification, ground on (old) Article 31 paragraph 4^1 Labour Code, the written form of this notification representing its unique condition of validity[18].

The current legislation in matter is much more clear, because it stipulates the exclusive character of the written notification, as ground for cessing the work relationships, the lack of obligation to give notice, the lack of obligation to motivate the notification[19]. In this way, the probationary period represents a true forfeit clause, the issue of the notification involving immediately the cessation of the individual employment contract, without being necessary other formalities or the motivation of the respective act. It is obvious that, the cessation of the contract during or at the end of the probationary period is an independent situation of the work relationships, different from dismissal (for professional inadequacy) and resignation.

The notification may come from any of the contractual parties – employee or employer, but it must have a written form. Also, the notification must be communicated to the other party in a manner likely to make possible its acknowledgement, but as we have mentioned, it is not necessary to motivate it.

The initiative of any of the contractual parties to denounce the contract by a written notification, at the end of the probationary period, engages the liability of the person in cause[20]. There is also the possibility that the employee goes to law if the forfeit clause was realized by violating the law (without being respected the written form of the notification or without being communicated) or if an abuse of distress has been committed, demanding for compensations. On the other hand, the employer's appreciation of the employee's professional skills and qualifications cannot be limited by the law court, because the employer is the only person capable to assess the necessities in balance with the job description, the demands and the efficiency required.

From the norm according to which, in the situation of ceasing the work relationships during or at the end of the probationary period, there is no right to notice, one exception exists. Thus, in the case of employee's dismissal during the probationary period, either on medical problems or on job abolition, the employer will have to give to the employee a notice period of up to 20 working days.

In conclusion, probation period is a subsidiary and subsequently, in principle, method in relation with contest, examination, interview or any other verification form of the future employee's perofesional and personal skills.

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[18] C. A Bucureşti, s.a VII-a civ., confl. mun. şi asig. soc., dec. nr. 1421/R/2007; C. A Bucureşti, s.a VII-a civ., confl. mun. şi asig. soc., dec. nr. 3760/R/2010.

[19] Article 31 paragraph 3 Labour Code: "During or at the end of the probationary period, the individual employment contract may only cease by a written notification, without notice, on the initiative of any party, without being necessary to motivate the decision".

[20] V. Barbu, C. Cernat, *Analiză critică asupra dispoziţiilor legale privind perioada de probă*, in Revista Română de Dreptul Muncii, nr. 4/2008, p. 46.

The setting of the probation period in the individual labor contract is optional, that means it insert into the contract as a mutual clause. In fact, the agreement of the future employee is needed, because the initiatives to verify the profesional skillls of employee wil belong to the employer. But, if the probation period is setteled it becames mandatory, like any other contractual clause. The beginning of the probation period is , also, means the beginning of the individaul labour contract, so, can not conceive of a probationary period of employment outside of a legally binding contract.

On another hand, the settling of the probation period is a mandatory, by law, only in case of employment of disable persons and in case of the graduates of higher education institutions. In this last case, the skills verification takes the form of internship.

We consider that the employment probation period has the legal nature of a forfeiture clause which works for both contracting parties and it produces the consequences provided by law. It can not be considering a resolutory condition because if it would be considering that the labor law will be eluded. In fact, it would violate the provisions that sets the reasons and conditions termination of the employment probation period.

The cease of individual employment contract in probation period is made only by written notice. In other words, whenever the employer considers that the employee does not meet the requirements of the position held or employee does not agree work needed to perform, may terminate the employment contract by giving written notice. Written form of notification is a condition *ad validitatem*, it should not be grounded in fact or law and is not required prior to completing an employee performance evaluation procedures.

References

- V. Barbu, C. Cernat, *Analiză critică asupra dispoziţiilor legale privind perioada de probă*, in Revista Română de Dreptul Muncii, nr.4/2008.
- Ş. Beligrădeanu, I.T. Ştefănescu, *Perioada de probă în reglementarea Codului muncii*, in Dreptul nr. 8/2003 magazine.
- R. G. Cristescu, C. Cristescu, *Codul muncii. Analize şi soluţii*, Ed. Hamagiu, Bucureşti, 2011
- J. C. Jevellier*, Droit du travail*, 6e edition, L. G. D., Paris, 1998.
- I.T. Ştefănescu*, Perioada de probă în reglementarea Codului muncii*, in Dreptul nr. 8/2003 magazine.
- Al. Ţiclea, *Tratat de dreptul muncii*, Ed. Universul Juridic, Bucureşti, 2007.
- L. Uţă, F. Rotaru, S. Cristescu, *Codul muncii adnotat*, vol. I, Ed. Hamagiu, 2011